

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION (DAYTON)

AMERICAN POWER, LLC	:	Case No. 3:17-cv-00347-WHR
	:	
Plaintiff,	:	(Judge Walter H. Rice)
	:	
v.	:	
	:	
DOUGLAS O. HARRIS, <u>et al.</u>	:	
	:	
Defendants.	:	

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**MARMON AND FONTAINE DEFENDANTS' MOTION FOR LEAVE OF COURT TO  
FILE RESPONSE TO PLAINTIFF'S SUPPLEMENTAL OPPOSITION (DKT. 63)**

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Pursuant to S.D. Ohio L.R. 7.2(a)(2), Marmon Highway Technologies, Inc. ("Marmon") and Kelly Dier (together, the "Marmon Defendants"), and Fontaine Engineered Products, Inc. ("Fontaine"), Henry Prochazka, and Berkley Buchanan (together, the "Fontaine Defendants"), through counsel, hereby move for leave of Court to file their Response to Plaintiff's Supplemental Memorandum in Opposition to Defendants' Objections to Report and Recommendations of Magistrate Judge and Memorandum of Law (Dkt. No. 63). A memorandum in support is attached.

Respectfully submitted,

s/ Timothy G. Pepper  
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and Fontaine Engineered Products Inc.

**MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE OF COURT TO FILE  
RESPONSE TO PLAINTIFF'S SUPPLEMENTAL OPPOSITION (DOC. NO. 63)**

Plaintiff's Supplemental Opposition to Defendants' Objections to Report and Recommendation of Magistrate Judge ("Supplemental Opposition," Doc. No. 63) was filed more than one year after the "new" decision on which it is based, *Dougherty v. Esperion Therapeutics, Inc.*, 905 F.3d 971 (6th Cir. 2018), was issued, and more than one year after briefing closed on Defendants' objections to the Magistrate's Report and Recommendations. Plaintiff's tardiness in raising the *Dougherty* case as supplemental authority is reason enough to disregard the Supplemental Opposition. However, it should be disregarded as to the Marmon and Fontaine Defendants<sup>1</sup> for the additional reason that the *Dougherty* case is wholly inapposite to the Marmon and Fontaine Defendants' dismissal arguments. The *Dougherty* court did not address the vast majority of the legal arguments raised in the Marmon and Fontaine Defendants' dismissal papers, and on the one narrow issue where there is some overlap in the legal argument – whether plaintiffs sufficiently pled *scienter* at the dismissal stage – the facts in *Dougherty* are easily distinguished from those applicable to the Marmon and Fontaine Defendants here. For those reasons, the Marmon and Fontaine Defendants respectfully request leave of Court to file a short response to Plaintiff's Supplemental Opposition.

A proposed order granting leave of Court is attached hereto as Exhibit A and the Marmon and Fontaine Defendants' proposed response to Plaintiff's Supplemental Opposition is attached hereto as Exhibit B.

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<sup>1</sup> Marmon Highway Technologies, Inc. ("Marmon") and Kelly Dier (together, the "Marmon Defendants"), and Fontaine Engineered Products, Inc. ("Fontaine"), Henry Prochazka, and Berkley Buchanan (together, the "Fontaine Defendants").

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